

Before the  
FEDERAL COMMUNICATION COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of AT&T Inc. For Forbearance Under 47 U.S.C.	)	
§ 160 From Enforcement Of Certain of the	)	WC Docket No. 07-21
Commission's Cost Assignment Rules	)	
	)	
Petition of Verizon For Forbearance Under 47 U.S.C.	)	
§ 160(c) from Enforcement of Certain of the	)	
Commission's Recordkeeping and Reporting	)	WC Docket No. 07-273
Requirements	)	
	)	
Petition of Qwest Corporation for Forbearance from	)	
Enforcement of the Commission's ARMIS and 492A	)	WC Docket No. 07-204
Reporting Requirements Pursuant to 47 U.S.C. § 160	)	

**Reply to Opposition of Joint Applicants' Application for Review**

The AdHoc Telecommunications Users Committee and COMPTel ("Joint Applicants"), pursuant to section 1.115(d) of the Commission's Rules, hereby reply to oppositions to Joint Applicants' January 30, 2009 Application for Review of Action Taken Pursuant to Delegated Authority ("AFR") in the above-captioned dockets.<sup>1</sup>

The AFR urged the Commission to vacate the Wireline Competition Bureau's ("WCB") approval of cost assignment plans submitted by the BOCs and then to reverse the WCB's decision or to remand the matter to the WCB. Joint Applicants first explained that the WCB's decision was inconsistent with the requirement that administrative agency decisions be supported with reasoned explanations. Next, Joint Applicants explained that the BOCs' cost assignment compliance plans do not satisfy the requirements of the *Cost Assignment Forbearance Orders*.<sup>2</sup>

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<sup>1</sup> AT&T, Qwest and Verizon (collectively hereinafter the "BOCs") filed oppositions to the AFR.

<sup>2</sup> See, *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21, 05-342, 23 FCC Rcd 7302 (2008) (*AT&T Cost Assignment Forbearance Order*), *pet. for recon. pending, pet. for review pending*, *NASUCA v. FCC*, Case No. 08-1226 (D.C. Cir. filed June 23, 2008); *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, WC Docket Nos. 08-190, 07-139, 07-204, 07-273, 07-21,

## I. BOCs' Arguments Notwithstanding, The WCB Was Required To Explain Its Reasons For Approving The Cost Assignment Compliance Plans.

The BOCs do not argue that the WCB provided a reasoned explanation for its decision to approve their cost assignment compliance plans. Instead, they assert that the WCB was not required to provide an explanation.

As Joint Applicants pointed out, the Commission has acknowledged that subordinate parts of the agency operating pursuant to delegated authority must provide reasoned explanations for their actions.<sup>3</sup> The BOCs fail to provide an argument for distinguishing or overturning that Commission precedent.

Verizon contends that the WCB's approval of the compliance plans was a mere ministerial act, requiring no explanation.<sup>4</sup> The cases cited by Verizon to support this contention do not, however, support Verizon's position. In one case, *aaiPharma Inc. v. Thompson*, 296 F.3d 227 (4<sup>th</sup> Cir. 2002), the court held that the FDA's role with respect to patent listings in the "Orange Book" is completely passive and ministerial. In *United States v. Sobkowicz*, 1993 U.S. App. LEXIS 11196 (9<sup>th</sup> Cir. 1993), the court concluded that the Treasurer of the United States was not obligated to initiate a notice and a comment rulemaking before certifying the interest rates used in calculating penalties owed to the government because the Treasurer merely certified the interest rate set by the Federal Reserve Board. Finally, in *United States v. Thompson*, 687 F.2d 1279 (10<sup>th</sup> Cir. 1982), the court held that the timing and placement of prohibition signs on the fence of a nuclear facility was nothing more than the execution of an existing regulation and that a hearing was not required before the posting.

In all of the cases cited by Verizon, the challenged actions did not involve substantive judgments. In evaluating BOC's compliance plans and objections thereto, the WCB role was to weigh competing arguments and *make a determination* as to whether or not the plans met the requirements for the plans

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23 FCC Rcd 13647 (2008) (*Verizon/Qwest Cost Assignment Forbearance Order*), *pet. for recon. pending, pet. for review pending*, *NASUCA v. FCC*, Case No. 08-1353 (D.C. Cir. filed Nov. 4, 2008) (collectively, the "*Cost Assignment Forbearance Orders*").

<sup>3</sup> See, Joint Applicants' AFR, at 5-6.

<sup>4</sup> Verizon, Opposition at 6-9.

established by *Cost Assignment Forbearance Orders*. Its role was far more than ministerial. The WCB engaged in substantive decision making for which a reasoned explanation is required.

The BOCs also argue that the WCB was not obligated to provide an explanation for its approval of the compliance plans because the Bureau's evaluation of the plans was an informal adjudication, not a rulemaking.<sup>5</sup> Apparently, the BOCs contend that *no* explanations for agency actions are needed in informal adjudications.

None of the BOCs, however, support their contentions with an examination of the Administrative Procedure Act's ("APA") definitions of "rule" and "rulemaking."<sup>6</sup> Given the APA's definitions of rule and rulemaking, (see note 6 *infra*), it is quite apparent that the WCB's review of the BOC's compliance plans fits the definition of a rulemaking to which the requirement for reasoned decision making clearly applies, even when the action is taken pursuant to delegated authority. As explained in the AFR, the WCB's public notice fails to meet that requirement.

Assuming *arguendo* that the WCB was engaged in an informal adjudication, as the BOCs contend,<sup>7</sup> it still was required to explain the reasons that led it to approve the BOCs' compliance plans. Although informal adjudications require less in the way of procedural protections than a formal adjudication, administrative agencies still must provide explanations for their decisions in informal adjudications. None of the cases cited by the BOCs are to the contrary. Indeed, without an explanation of the reasons supporting a decision in an informal adjudication, courts could not engage in the judicial review intended in section 706 of the APA.<sup>8</sup> The

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<sup>5</sup> AT&T, Opposition at 7-9; Qwest, Opposition at 11-12; Verizon, Opposition at 9-12.

<sup>6</sup> Section 551.4 of the APA defines "rule" as, "[t]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ... and includes the approval or prescription for the future of ... prices, facilities, appliances, services or allowances therefore or of valuations, *costs, or accounting or practices bearing on any of the foregoing.*" *Emphasis added.* Section 551.5 of the APA, of course, defines "rule making" as the agency process for formulating, amending or repealing a rule.

<sup>7</sup> Note 4, *supra*.

<sup>8</sup> 5 U.S.C. §706 provides, *inter alia*, that reviewing courts shall hold unlawful agency decisions found to be arbitrary and capricious. Although the substantial evidence requirement does not apply to informal

Supreme Court has reconciled sections 555 and 706 of the APA by holding that section 706 mandates an explanation that would allow the courts to review the agency's rationale at the time of decision.<sup>9</sup>

Evaluation of the BOCs' cost assignment plans was a consequential substantive matter, not a ministerial matter, for which the WCB should have provided a reasoned explanation.

**II. The BOCs' Plans Clearly Did Not Satisfy the Requirements Established in the *Cost Assignment Forbearance Orders*.**

Contrary to BOC assertions, the AFR does not rehash oppositions to, or collaterally attack the *Cost Assignment Forbearance Orders*.<sup>10</sup> Instead, the AFR identified material deficiencies in the BOCs' compliance plans.<sup>11</sup> Notably, Joint Applicants pointed to the unchecked discretion and incentive that the BOCs would have to re-specify allocation ratios and design special studies to allocate costs to serve their corporate objectives. The BOCs counter by arguing that they are constrained by GAAP, Sarbanes Oxley and the USOA. Those constraints, however, are insufficient for Commission purposes because they do not control the allocation of total company costs between regulated and unregulated services and among regulated services. The BOCs also argue that their compliance plans need only describe generally a *process* that they would use to produce cost and revenue data. Given its conclusion that it has continuing regulatory responsibilities because the BOCs possess exclusionary market power, the Commission must have envisioned something more substantive. There would have been no reason for the Commission to require descriptions of transition plans if all that it wanted were statements from the BOCs that they would provide cost and revenue data developed pursuant to unspecified methodologies when the Commission asked for the data. Indeed, the Commission charged the BOCs with explaining how they would replace the cost assignment rules with new assignment procedures.<sup>12</sup> The Commission must have intended that the BOCs at least describe the methodologies and principals that

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adjudications, (Contrary to Qwest's mischaracterization at page 10 of its Opposition, Joint Applicants never claimed that it applied in this case), an explanation of the reasons for the decision is required.

<sup>9</sup> *PBGC v. LTV Corp.*, 496 U.S. 633, 654 (1990).

<sup>10</sup> *Cf.*, AT&T, Opposition, at 6; Qwest, Opposition at 3.

<sup>11</sup> Joint Applicants do repeat those deficiencies in this pleading.

<sup>12</sup> *AT&T Cost Assignment Forbearance Order*, ¶31.

they would use to allocate costs and revenues. The BOCs did not, however, offer such explanations, nor explain the transition to the new allocation procedures. Accordingly, the WCB could not know that the BOCs' compliance plans will preserve the integrity and reliability of the data, and should not have approved the plans.<sup>13</sup>

The BOCs also fail to explain how officers of their corporations can truthfully certify that their companies are in compliance with section 254(k) of the Communications Act of 1934, as amended. Without knowing how costs and revenues are allocated and whether the allocation methodology is acceptable to the Commission, the 254(k) certification is a farce.

The Commission intended more, and needs more, than the BOCs have offered in their empty compliance plans. The WCB should have rejected the BOCs' compliance plans for being inconsistent with the requirements of the *Cost Assignment Forbearance Orders*. Nothing in the BOCs' oppositions to the AFR cures the deficiencies in their plans or rehabilitates the WCB's approval of those plans.

### III. Conclusion

In view of the foregoing, Joint Applicants again urge the Commission to vacate the WCB's decision approving the BOCs' cost assignment compliance plans, and to then reverse or remand the matter to the WCB.

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<sup>13</sup> *AT&T Cost Assignment Forbearance Order*, ¶21.

## Certificate of Service

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